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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL LEWIS FOOTS,

Defendant and Appellant.

A124697

(Alameda County  
Super. Ct. No. 153795)

Defendant Michael Foots appeals from a judgment sentencing him to a four-year prison term following revocation of probation. He contends that the trial court erred in sentencing him without benefit of a supplemental probation report, instead relying on a report prepared over two years earlier when he was granted probation. The People concede the trial court's error but contend defendant has not demonstrated he was prejudiced by the error. We reverse.

**BACKGROUND**

On October 5, 2006, defendant was arrested for selling \$20 worth of marijuana to an undercover Oakland police officer. Following a preliminary hearing, the District Attorney of Alameda County charged him with one felony count of sale or transportation of marijuana. (Health & Saf. Code, § 11360, subd. (a).) The information also alleged three prior convictions and two prior prison terms within the meaning of Penal Code section 667.5, subdivision (d).

On January 2, 2007, pursuant to a negotiated plea agreement, defendant pleaded no contest to the charged offense in exchange for a grant of probation and dismissal of

the prior conviction allegations for purposes of sentencing. The matter was then referred to the probation department for preparation of a probation report.

On January 31, 2007, the probation report was filed with the court. At a sentencing hearing that same day, the court suspended imposition of sentence and granted three years formal probation, subject to the standard terms of probation, and ordered defendant to pay certain fees and fines.

On August 14, 2008, defendant was involved in a confrontation with a neighborhood family with whom he had had conflicts in the past. The details of the incident are irrelevant for our purposes, and it is enough to say that defendant was arrested for brandishing a firearm and being a felon in possession of a firearm.<sup>1</sup> (Pen. Code, §§ 417, subd. (a)(2), 12021, subd. (a)(1).) Days later, the district attorney filed a petition to revoke probation based on defendant's alleged violation of the terms of his probation. The court ordered his probation revoked, an order the court affirmed in February 2009 following a formal probation revocation hearing.

At a February 24, 2009 sentencing hearing, the court began by noting that it had reviewed the January 31, 2007 probation report. It further noted that while the report identified five factors in aggravation, it identified only one mitigating factor—that defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process—and the court disagreed that the factor was applicable. The court then denied a further grant of probation and sentenced defendant to the upper term of four years on the sale of marijuana offense.

This timely appeal followed.

## **DISCUSSION**

Defendant raises one argument on appeal: that the trial court erred by imposing sentence following revocation of his probation without first obtaining a supplemental probation report and that he was prejudiced by this error.

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<sup>1</sup> A subsequent oral amendment added one count for possession of marijuana for sale (Health & Saf. Code, § 11359), based on defendant's attempt to dispose of a bag of marijuana at the time of his arrest.

The People concede—and rightly so—that the trial court erred in failing to obtain a supplemental probation report. The trial court must order a probation report when a person convicted of a felony is eligible for probation. (Pen. Code, § 1203, subd. (b).) When probation is revoked or other circumstances lead to the passage of a significant amount of time between the original probation report and subsequent sentencing proceeding, the court must order a supplemental probation report. (Cal. Rules of Court, rule 4.411(c) [“The court must order a supplemental probation officer’s report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared.”].) According to the Advisory Committee Comment to Rule 4.411(c), a period of more than six months may constitute a significant period of time. (Advisory Com. com., West’s Cal. Rules of Court (2009 ed.) foll. rule 4.411(c), p. 241; accord *People v. Dobbins* (2005) 127 Cal.App.4th 176, 181.)

Here, the probation report was prepared for the January 31, 2007 sentencing hearing, when defendant was granted probation. He was arrested on August 14, 2008, and remained in custody until his probation revocation and sentencing on February 24, 2009. More than two years—including 18 months during which defendant was out of custody—passed between preparation of the probation report and sentencing, yet the trial court relied on the original probation report in imposing the four-year upper term. By failing to order and consider a supplemental report, the trial court erred. (See, e.g., *People v. Dobbins, supra*, 127 Cal.App.4th at p. 181 [trial court erred by proceeding without a supplemental report despite the passage of eight months since preparation of initial report].)

Of bigger debate, however, is whether defendant was prejudiced by this error. He, of course, argues that he was; the People claim he was not. We agree with defendant.

“[W]here a current probation report is required, that right is considered fundamental and its abridgment is generally treated as reversible error.” (*People v. Mariano* (1983) 144 Cal.App.3d 814, 824-825. See also *People v. Mercant* (1989) 216 Cal.App.3d 1192, 1196 [after sentencing was delayed for three years due to defendant’s failure to appear, Court of Appeal declined to find that the absence of a

current probation report was harmless error because the trial court was not bound to impose a particular sentence and the Court of Appeal could not know what a current report might have disclosed]; *People v. Rojas* (1962) 57 Cal.2d 676, 682-683 [court remanded for preparation of a probation report because defendant had been out of custody on bail during the pendency of his appeal which led to his resentencing and his conduct during that period would “bear directly on the question of [his] ‘reformation and rehabilitation’ while under restraint of judicial punishment”].)

*People v. Dobbins, supra*, 127 Cal.App.4th 176, is instructive, despite the fact that the court found harmless error in the trial court’s failure to order a supplemental probation report. In a scenario similar to that before us, defendant pleaded no contest to the charges against him in exchange for a suspended sentence. After he violated probation, the court declined a further grant of probation and ordered him to serve the suspended sentence. Despite the passage of eight months between preparation of the probation report and the execution of sentence, the trial court relied on the initial report without ordering its supplemented. (*Id.* at p. 178.)

On appeal, defendant argued that “the trial court erred by failing to order and consider an updated or supplemental probation report before declining any further grant of probation.” (*Dobbins, supra*, 127 Cal.App.4th at p. 178.) The Court of Appeal agreed, but found the error to be harmless given the “peculiar facts” of the case. (*Ibid.*) The court explained: “The original probation report apprised the trial court of defendant’s background and other relevant information. And his record was such (including as it did numerous parole violations and periods of incarceration) that there was little justification for a further grant of probation. Moreover, the trial court was aware from the Proposition 36 status report and from the trial that defendant’s conduct while on probation had been poor. The judge who sentenced defendant was the same judge who presided over the trial and was thus intimately acquainted with the facts underlying his violation of probation, which involved use of a weapon. Considering these circumstances, there is no reason to believe that additional information would have led to reinstatement of probation.” (*Id.* at p. 183.) Because of these “peculiar facts,” the

court concluded that “there is no doubt the result would have been the same if a supplemental probation report had been prepared.” (*Ibid.*)

From these cases, we surmise that failure to order a supplemental probation report is reversible error, absent “peculiar facts” demonstrating that the “result would have been the same if a supplemental probation report had been prepared.” (*Dobbins, supra*, 127 Cal.App.4th at p. 183.) Here there are no such facts. Defendant was out of custody for eighteen months between the grant and subsequent revocation of his probation. Unlike in *Dobbins*, there was no information before the trial court reflecting defendant’s conduct during that period.

The People’s opposition to defendant’s prejudice claim says this in its entirety: “[Defendant] does not suggest any favorable information of which the court was unaware at the time of sentencing that would have been included in a supplement[al] probation report. Considering this record, there is no reason to believe that additional information would have led to a reduced prison sentence, much less to another grant of probation. [Defendant] does not show prejudice from the trial court’s failure to order a supplemental probation report.” The People’s argument epitomizes the problem. Defendant is bound on appeal by the matters that were before the trial court. (*Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632 [“ documents not before the trial court cannot be included as part of the record on appeal and thus must be disregarded as beyond the scope of appellate review”].) But because the trial court failed to order a supplemental report, the record on appeal is necessarily devoid of anything demonstrating that defendant would likely have received a lighter sentence than the four-year upper term. It may be that a supplemental report would not have shed any positive light on defendant’s conduct, but it is not for us to speculate as to what information such a report might have contained and how that information might have affected the trial court’s decision. Ultimately, because we cannot conclusively rule out the possibility that defendant might have obtained a more favorable result if the trial court had before it a more current probation report, we must conclude he was prejudiced by the trial court’s error.

## **DISPOSITION**

The judgment is reversed and the matter remanded for the sole purpose of allowing the trial court to order the preparation of and consider a current probation report, and to resentence defendant if appropriate.

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Richman, J.

We concur:

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Haerle, Acting P.J.

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Lambden, J.